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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

DOCKET No. 205

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

GERALD A. EUBANK

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HARRY J. RUDICK,
Counsel for Respondent.

Of Counsel:
JOHN W. DRYE, JR.

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
ARGUMENT (Reasons for denying the writ):	
1. This Court has already denied certiorari in two cases dealing with the legal issue here involved	2
2. The decision of the Court below is not in conflict with either *Lucas* v. *Earl*, 281 U. S. 111, or with applicable decisions of other Circuit Courts of Appeals	3
CONCLUSION	9

CITATIONS

Cases:

Bishop *v.* Commissioner, 54 F. (2d) 298	2, 3
Blair *v.* Commissioner, 300 U. S. 5	8
Hall *v.* Burnet, 54 F. (2d) 443, cert. den. 285 U. S. 552	2
Helvering *v.* Horst, No. 27, 1940 Term	3
Helvering *v.* Seatree, 72 F. (2d) 67	9
Lucas *v.* Earl, 281 U. S. 111	3
Matchette *v.* Helvering, 81 F. (2d) 73, cert. den. 298 U. S. 677	9
Nelson *v.* Ferguson, 56 F. (2d) 121, cert. den. 236 U. S. 5	9
Parker *v.* Routzahn, 56 F. (2d) 730, cert. den. 287 U. S. 606	2
Poe *v.* Seaborn, 282 U. S. 101	7
Siegel *v.* Commissioner, 20 B. T. A. 563	9
United States *v.* Malcolm, 282 U. S. 792	7
Van Meter *v.* Commissioner, 61 F. (2d) 817	6

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Opinions Below.

The opinion of the Board of Tax Appeals is reported at 39 B. T. A. 583. The opinion of the Circuit Court of Appeals is reported at 110 F. (2d) 737.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 12, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Argument.

The respondent submits that the petition for a writ of certiorari should be denied for the reasons that: (1) this

Court has already on two occasions denied certiorari in cases involving the same legal issue; and (2) there is no conflict of decisions. These points will be discussed in the order named.

1. This Court has already denied certiorari in two cases dealing with the legal issue here involved.

This Court has already denied certiorari in *Hall* v. *Burnet,* 54 F. (2d) 443 (App. D. C., 1931), cert. den. 285 U. S. 552. There, as here, the property right to receive future renewal commissions on insurance policies was assigned and the assignor was held by the Court of Appeals, reversing the Board of Tax Appeals, *not* taxable on the commissions paid to the assignee. A writ was denied despite the fact that the Government in its petition for certiorari alleged conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Bishop* v. *Commissioner,* 54 F. (2d) 298 (C. C. A. 7th, 1931), which decision arrived at a different result on a different factual situation. This Court again denied a writ in *Parker* v. *Routzahn,* 56 F. (2d) 730 (C. C. A. 6th, 1932), cert. den. 287 U. S. 606, which held similar renewal commissions taxable to the husband as assignor, but in which the facts were also distinguished from those in *Hall* v. *Burnet.*

The *Hall* and *Parker* cases both involved the taxability of assigned renewal commissions, as does the present case. The *Parker* case distinguished *Hall* v. *Burnet* on the ground that in the *Hall* case no continued labors by the assignor after the date of the assignment were essential to the flow of income, and this Court refused to grant a review. The denial of certiorari in both the *Parker* and *Hall* cases compels the conclusion that this Court regards the present question as depending upon the factual existence of the assignor's control over the flow of the assigned income after

the assignment has been made. This was the test which the Court below applied. There is no novel element in the present case which requires a review of a situation which this Court has already on two separate occasions declined to pass upon. The fact that this Court on April 8, 1940 granted certiorari in *Helvering* v. *Horst*, No. 27, 1940 Term, involving the assignment of unmatured bond coupons (see Petitioner's Brief, p. 5), is not an adequate ground for the granting of a writ in the present case.

2. The decision of the Court below is not in conflict either with Lucas v. Earl, 281 U. S. 111, or with applicable decisions of other Circuit Courts of Appeals.

The decisions of the courts are in full agreement in holding that the assignee, rather than the assignor, is the taxable person where the property right to renewal commissions is assigned and the commissions are in no way dependent upon the continued services of the assignor. Certain of the holdings in which language is used indicating a conflict are perfectly reconcilable upon an examination of the facts involved. In not one of the cases decided in favor of the Government did it appear that the assignor had no further obligation to render services in order to insure the receipt of the commissions by the assignee.

The three cases referred to by the petitioner (pp. 4-5) fail, upon analysis, to support the petitioner's allegation of a conflict. In *Bishop* v. *Commissioner*, 54 F. (2d) 298 (C. C. A. 7th, 1931), the assignment (of the husband's right, title and interest in one-third of certain renewal commissions) was expressly made subject to the terms of a *continuing* contract with the insurance company, so that the assignor, by acts subsequent to the assignment, such as breach of the contract, could have defeated or at least diminished the assignee's right to receive commissions.

The assignor, therefore, retained a measure of control over the assigned income. The Court held the assignor taxable on the assigned commissions, but instead of indicating that its decision conflicted with *Hall* v. *Burnet,* the Court expressly cited and approved that decision. The distinction was made that in the *Hall* case, which involved a terminated contract*—as does the instant case—there was an assignment of a property right, *in praesenti,* which carried with it the income, whereas in the *Bishop* case, which involved a continuing contract, there was an assignment of the income *per se* rather than of the property right which produced the income. However, this is only another way of pointing out that an assignment of future earnings which is dependent upon the rendition of future services by the assignor cannot possibly convey a property right *in praesenti* for the reason that no one can assign the will to work, and consequently a right to receive income dependent upon the efforts of the assignor can never constitute an indefeasible right: the assignor necessarily retains control over the future income.

In *Parker* v. *Routzahn* an insurance agent had assigned to his wife all "renewal commissions hereafter accruing to me * * *." The Circuit Court of Appeals for the Sixth Circuit, in taxing the assignor upon the commissions paid over to the wife, stressed that by the facts of the situation, the assignment became effective only after the income had already been realized by the assignor. This was true because the assignor remained in the service of the company after the assignment and because, unlike the present situation, the income was dependent upon services performed subsequent to the assignment.

*See 17 B. T. A. 752. The contract in the *Hall* case was dated September 23, 1905, and ran for fifteen years; the assignment was made on January 2, 1921.

Hall v. *Burnet* was approved (p. 733) but was distinguished on this ground: "Such cases (including *Hall* v. *Burnet*), however, are substantially different, in their facts, from the present case, which involves an attempted assignment only of compensation for personal services of the assignor accruing subsequent to the time of such assignment."* In opposing certiorari in the *Parker* case, the Government itself pointed out the distinction between that case and the *Hall* case so succinctly that we take the liberty of adopting the following language from the Government's brief (p. 10):

> "The court (the Court of Appeals of the District of Columbia) pointed out that when the assignment was made (in 1921), the taxpayer's right to the commissions had become fixed independent of any future services to be rendered by him, and it construed the assignment as a present transfer of the property from which the income was derived and not merely an assignment of future earnings or income. Upon that ground the court held *Lucas* v. *Earl, supra,* inapplicable. Upon the same ground the *Hall* case was distinguished by the court below and by the Circuit Court of Appeals for the Seventh Circuit in *Bishop* v. *Commissioner, supra.*"

Since the instant case is substantially on all fours with the *Hall* case, the distinction drawn above between that

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*See also the following statement of the Court at page 731:

> "The funds and commissions mentioned in this instrument consisted of certain bonuses and commissions thereafter becoming payable by the insurance company to the plaintiff under the terms of his employment by it, *the amount of which compensation was dependent on the length of his service and the amount of premiums to be received by the company under its insurance policies sold by plaintiff in previous and in future years.*" (Italics ours.)

case and the *Parker* and *Bishop* cases also seems to distinguish the latter two cases from the instant case.

The facts in *Van Meter* v. *Commissioner,* 61 F. (2d) 817 (C. C. A. 8th, 1932), the final case which the petitioner asserts to be in conflict with the decision in the present case, also plainly disclosed that the assignments were made prior to the termination of the agency contracts and at a time when the assignor was still under obligation to the insurance company. In fact, one of the assignments was made prior to the date on which the contract with the insurance company was signed (see Board's statement of the facts, 22 B. T. A. 1204-5). Furthermore, the assignor, the Van Meter Company, actually continued to exercise control over the flow of the commissions, since it made various successive assignments during the term of the contract with the insurance company reapportioning the interests of the assignees in the commissions (22 B. T. A. 1206). Therefore, as in *Bishop* v. *Commissioner* and *Parker* v. *Routzahn,* the assignor, subsequent to the date of the assignment, had the power to defeat the interest of the assignees in the commissions. Clearly these factors demanded tax against the assignor regardless of the Eighth Circuit's superfluous expression of disagreement with the views expressed in *Hall* v. *Burnet.* On its facts the *Van Meter* case may plainly be distinguished from the present situation, in which the contracts at the time of the assignment were completely terminated and the petitioner was under no further obligation with respect to them.

The further statement in petitioner's brief (p. 5) that the decision below conflicts with the decision of this Court in *Lucas* v. *Earl,** 281 U. S. 111, fails to observe the dis-

* The Government made the same assertion of conflict in its petition for certiorari in the *Hall* case which was denied by this Court.

tinction which the lower court itself points out between the two situations. In that case, Earl and his wife agreed that any property thereafter acquired by either of them, whether by earnings or otherwise, "shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise, with the right of survivorship." It is true that *Lucas* v. *Earl* appears to state broadly that a tax upon salary must be paid by the man who earns it. However, the respondent is erroneous in stating that nothing in the decisions of this Court limits the apparently broad holding of *Lucas* v. *Earl.* The respondent does not, for example, refer to the community property decisions of this Court, in which the Court held that income may be taxable to someone other than the earner if the person who performs the services has been completely divested of the right to the compensation before it accrues. See *Poe* v. *Seaborn,* 282 U. S. 101. Thus, Earl himself, if he is still alive and earning salaries and fees, is no longer taxable upon all of his compensation for personal services. California, in which he resided, is now a community property state, and as a consequence Earl would now be taxable only on one-half of such compensation. *U. S.* v. *Malcolm,* 282 U. S. 792.

In *Poe* v. *Seaborn,* the Court's opinion (282 U. S. 101, at p. 117) pointed out that in *Lucas* v. *Earl* the salaries were earned in years subsequent to the date of the contract. This is an all-important distinction since, so far as future earnings were concerned, Earl could render the future services or not, as he chose, and accordingly controlled the flow of income. There was, therefore, no property *res* which the taxpayer irrevocably transferred on the execution of the contract. In fact, the earnings in question in *Lucas* v. *Earl* did not arise from any contract of employment yet in existence at the time the contract be-

tween the husband and wife was executed. Here, on th other hand, an irrevocable assignment was made of th property right to receive commissions which were payabl because of past services and where the husband's contro over the situation and his entire employment with the in surance company had altogether ceased. Therefore, in stead of conflicting with *Lucas* v. *Earl,* the decision of th lower court is a necessary logical corollary of that decision The majority of the court below did not, as respondent implies, concede that its conclusion was in any way at vari ance with *Lucas* v. *Earl.* The court below was, it is true consciously distinguishing *Lucas* v. *Earl,* but the distinc tion was one which this Court has already recognized b its decision in *Poe* v. *Seaborn* and by its denial of certio rari in two cases (*Hall* v. *Burnet* and *Parker* v. *Routzahn*) which expressly interpreted the doctrine of the *Earl* case as applying only to future and not to past earnings.*

It is clear that an assignment of trust income operates to shift the tax from the assignor to the assignee. (*Blai*

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* In *Hall* v. *Burnet* the Court of Appeals of the District of Columbia distinguished that case from *Lucas* v. *Earl* a follows (54 F. (2d) 443 at 444):

> "Nor do we agree with the suggestion in the appel lee's brief that Lucas *v.* Earl, 281 U. S. 111, is control ling here.
>
> "* * * in the view we take of this case, wha was assigned was neither income nor earnings, bu property. *It was not an assignment of future earn ings* but the transfer of a property right, and thoug this property right gave rise to future income, uncer tain and contingent though it might be as to amount that fact does not destroy the distinction * * the right was fixed and certain, and *was independen of any future service to be rendered by him.* Any un certainty in the situation concerned only the amount but the agent's rights as against the insurance com pany were established." (Italics ours.)

v. *Commissioner,* 300 U. S. 5.) The same rule applies to an assignment of patent royalties (*Nelson* v. *Ferguson,* 56 F. (2d) 121, C. C. A. 3d, 1932, cert. den. 286 U. S. 565); an assignment of payments in the nature of an annuity (*Helvering* v. *Seatree,* 72 F. (2d) 67, App. D. C., 1934; *Siegel* v. *Commissioner,* 20 B. T. A. 563, appeal dismissed 59 F. (2d) 1055, C. C. A. 6th, 1931); and an assignment of a dividend accompanied by a transfer of the dividend-paying stock (*Matchette* v. *Helvering,* 81 F. (2d) 73, C. C. A. 2d, 1936, cert. den. 298 U. S. 677). There is no logical distinction between these types of income and an assignment of insurance renewal commissions where the assignor has completely divested himself of control over the income. Accordingly, the decision of the Court below simply recognizes the fundamental principle that the income tax attaches only to the person owning the right to receive or control the income.

Conclusion.

It is respectfully submitted that there is no conflict of decisions involved, that since this Court has already twice denied certiorari in comparable cases, the legal issue is plainly not of such public importance as to impel an exercise of this Court's jurisdiction, and that the petition for a writ should be denied.

Respectfully submitted,

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